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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JENNIFER GARCIA,<br><br>Defendant and Appellant. | B264873<br><br>(Los Angeles County<br>Super. Ct. No. MA063683) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Eric Harmon, Judge. Affirmed.

Susan Morrow Maxwell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Pithey Sullivan and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

In July 2014, defendant Jennifer Garcia committed a felony drug possession offense. In August 2014, while out on bail on the drug possession and related charges, she failed to appear in court, which constituted another felony pursuant to Penal Code section 1320.5. Subsequently, the underlying drug possession offense was reduced to a misdemeanor pursuant to Proposition 47. Defendant pled no contest to the misdemeanor. On appeal, she contends that the trial court erred in refusing to reduce her failure-to-appear charge to a misdemeanor, in light of the reduction in the underlying offense. We disagree and affirm.

## PROCEDURAL HISTORY[1]

On October 14, 2014, the Los Angeles County District Attorney (the People) filed an information in case number MA063683 charging defendant with felony possession of methamphetamine (Health & Saf. Code, §11377, subd. (a), count 1), misdemeanor possession of a smoking device (Health & Saf. Code, § 11364.1, subd. (a)(1), count 2) and misdemeanor petty theft (Pen. Code, § 484, subd. (a)[2], count 3). Defendant allegedly committed all three offenses on July 3, 2014. The information further alleged that defendant suffered a prior strike felony conviction in Texas (§§ 667, subds. (b)-(i), 1170.12, subd. (b)).

The same day, the People filed an information in case number MA064162 charging defendant with felony failure to appear while on bail (§ 1320.5, count 1). As the basis for this offense, the People alleged that defendant had been charged with commission of an underlying felony (the

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[1] We omit recitation of the underlying facts, as they are immaterial to the issues raised on appeal.

[2] All further statutory references are to the Penal Code unless otherwise indicated.

July 2014 possession charged in count one of case number MA063683),[3] was released from custody on bail, and failed to appear as required on August 20, 2014. In addition to the failure-to- appear count, the information charged defendant with the following offenses, all allegedly committed on September 3, 2014: felony forgery (§ 476, count 2), felony possession of methamphetamine (Health & Saf. Code, §11377, subd. (a), count 3), misdemeanor cruelty to a child by endangering health (§ 273a, subd. (b), count 4), and misdemeanor possession of a smoking device (Health & Saf. Code, § 11364.1, subd. (a)(1), count 5). The information further alleged that defendant committed counts one through three while she was released on bail or her own recognizance in another pending case (case number LA078027) and thus was subject to a sentencing enhancement pursuant to section 12022.1.

On February 11, 2015, defendant filed petitions seeking to reduce both charges for possession of methamphetamine (count one in case number MA063683 and count three in case number MA064162) from felonies to misdemeanors pursuant to section 1170.18, subdivisions (f) and (g). The court found the charges were eligible and granted the petition on April 21, 2015.

Also on April 21, 2015, over defendant's objection, the court granted the People's motion to consolidate case number MA063683 with case number MA064162. In a second amended information consolidating the cases, counts one through three reflected the corresponding counts from case number MA063683. The five counts from case number MA064162 were renumbered

[3] The information initially alleged that the underlying violation in count 1 was possession of narcotics pursuant to Health and Safety Code section 11374, subdivision (a). It was later corrected to reflect the defendant's alleged violation in count one of Health and Safety Code section 11377, subdivision (a).

to become counts four (failure to appear), five (forgery), six (possession of methamphetamine), seven (child endangerment), and eight (possession of smoking device). The second amended information also reflected the reduction of counts one and six (both alleged possession of methamphetamine) to misdemeanors.[4]

The second amended information also included the "on-bail" enhancement pursuant to section 12022.1, alleged as to counts four (failure to appear) and five (forgery).[5] The People further alleged that defendant suffered two prior strike convictions (§§ 667, subds. (b)-(i), 1170.12, subd. (b)).

Defendant pled no contest to counts one through three. The remaining counts proceeded to trial by jury. On May 7, 2015, the jury found defendant guilty on counts four (failure to appear), six (misdemeanor possession of methamphetamine), and eight (possession of a smoking device). They found defendant not guilty on counts five (forgery) and nine (counterfeit seal); they were unable to reach a verdict on count seven (child endangerment). The jury also found true the special allegation on count four pursuant to section 12022.1. At the conclusion of a bench trial on defendant's two prior convictions, the court found that one of the two convictions was a prior strike. The court sentenced defendant to a total term of 44 months in state prison. In addition, the two-year sentence under section 12022.1 was stayed pending a conviction in the primary case (LA078027) (§ 12022.1, subd. (d)).

At several points during the proceedings, defense counsel argued that count four, the failure-to-appear charge, should be reduced to a misdemeanor

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[4] The People later filed a third amended information which added count nine, alleging felony counterfeit seal in violation of section 472.

[5] Initially, the second amended information also included case number MA063683 as a primary offense triggering the sentencing enhancement, but that allegation was later stricken, leaving the charges in unrelated case number LA078027 as the applicable primary offense.

in light of the reduction of the underlying charge for drug possession.[6] The trial court denied those requests.

Defendant timely appealed.

## DISCUSSION

### I. Reduction of Failure to Appear Charge

As she did below, defendant contends that the trial court should have reduced her failure-to-appear charge to a misdemeanor once the underlying offense was reduced pursuant to Proposition 47.[7] We disagree.

Proposition 47 (the Safe Neighborhoods and Schools Act), effective November 5, 2014, reclassified certain felony drug and theft related offenses as misdemeanors, including possession of a controlled substance as charged here in counts one and six. (Prop. 47, as approved by voters, Gen. Elec. (Nov. 4, 2014), eff. Nov. 5, 2014; see also *People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089 (*Rivera*).) "Proposition 47 also created a new resentencing provision: section 1170.18. Under section 1170.18, a person 'currently serving' a felony sentence for an offense that is now a misdemeanor under Proposition 47, may petition for a recall of that sentence and request resentencing in accordance with the statutes that were added or amended by Proposition 47. (§ 1170.18, subd. (a).) . . . . Section 1170.18 also provides that persons who have completed felony sentences for offenses that would now be misdemeanors under Proposition 47 may file an application with the trial court to have their felony convictions 'designated as misdemeanors.' (§

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[6] Willful failure to appear while released from custody for a misdemeanor is punishable as a misdemeanor. (§ 1320, subd. (a).)

[7] This issue is currently pending in the California Supreme Court. (See *People v. Perez* (2015) 239 Cal.App.4th 24, review granted Nov. 18, 2015, S229046 [briefing deferred pending decision in *People v. Buycks* (2015) 241 Cal.App.4th 519, review granted Jan. 20, 2016, S231765]; see also *People v. Eandi* (2015) 239 Cal.App.4th 801, review granted Nov. 18, 2015, S229305 [same].)

1170.18, subd. (f); see *id*., subds. (g)-(h).)" (*Rivera, supra*, 233 Cal.App.4th at pp. 1092-1093.) In addition, subdivision (k) of section 1170.18 provides that "[a]ny felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes," with exceptions not applicable here.

As an initial matter, the Attorney General argues that the petitions "for reduction to misdemeanor" filed by defendant pursuant to section 1170.18 were not properly before the trial court, as defendant had not yet been convicted of the possession charges, and therefore was neither "currently serving" nor had she completed a felony sentence subject to recall or redesignation. (§ 1170.18, subds. (f)-(h).) Nevertheless, the Attorney General concedes that "the amendments to the information were appropriate," as the charged offenses were subject to reclassification under Proposition 47.

The Attorney General further asserts that the language of section 1320.5 forecloses defendant's argument here. Section 1320.5 provides that "Every person who is charged with or convicted of the commission of a felony, who is released from custody on bail, and who in order to evade the process of the court willfully fails to appear as required, is guilty of a felony." The gravamen of a violation of section 1320.5 is "the defendant's act of jumping bail and consequent evasion of the court's process," not the nature of the crime for which the defendant is ultimately convicted. (*People v. Walker* (2002) 29 Cal.4th 577, 585 (*Walker*); *People v. Jenkins* (1983) 146 Cal.App.3d 22, 28 [failure to appear is premised on a defendant's breach of a "contractual agreement"].) As such, a defendant may be convicted of violating section 1320.5 even if he or she is not ultimately convicted of "the charge for which he or she was out on bail when failing to appear in court as ordered."

(*Walker*, *supra*, at p. 583; see also *People v. Abdallah* (2016) 246 Cal.App.4th 736, 748 [noting that the language of section 1320.5 "makes clear that whether a defendant's felony conviction is ultimately downgraded under Proposition 47 does not affect the applicability" of a felony failure to appear offense].) Accordingly, because defendant was "charged with" felony drug possession at the time of her failure to appear, it is immaterial whether she was ultimately convicted of the underlying felony offense.

Focusing on the language of section 1170.18, subdivision (k) that a felony reduced to a misdemeanor under that section "shall be considered a misdemeanor for all purposes," defendant contends that the reduction of her drug possession charge must be given collateral retroactive effect. In defendant's words, the "reduction of the underlying felony drug charge to a misdemeanor negated a necessary statutory element of a failure to appear on a felony charge: having been 'charged with . . . the commission of a felony' (section 1320.5)."

Nothing in the express language of Proposition 47 or its ballot materials reflects an intent to provide the retroactive collateral relief defendant seeks. None of the procedures created by Proposition 47 apply to redesignation of convictions that are ancillary or collateral to a redesignated conviction. Further, we find defendant's reliance on *People v. Park* (2013) 56 Cal.4th 782 unpersuasive. In *Park*, the court considered similar language in section 17, subdivision (b), which states that when a court reclassifies a "wobbler" offense as a misdemeanor under the provisions of that statute, "it is a misdemeanor for all purposes." The Supreme Court held that a "wobbler" conviction reduced to a misdemeanor under section 17, subdivision (b) could not subsequently be used to support an enhancement for a prior serious felony conviction under section 667, subdivision (a). (*Park*, *supra*, at p. 798.)

Crucially, the underlying felony conviction in *Park* had been reduced to a misdemeanor before the proceedings seeking to apply the prior serious felony conviction enhancement. (*Id*. at pp. 787-788.) By contrast, the court noted that the defendant would have been "subject to the section 667(a) enhancement had he committed and been convicted of the present crimes before the court reduced the earlier offense to a misdemeanor." (*Id*. at p. 802.) Here, defendant's felony charge was not reduced to a misdemeanor until after she failed to appear. Thus, at the time she committed the offense, she had been charged with an underlying felony and ordered to appear in court, and the trial court did not err in refusing to reduce the failure-to-appear charge to a misdemeanor under section 1320.5. (See *Rivera, supra*, 233 Cal.App.4th at p. 1100 [noting that "in construing this language from section 17(b), the California Supreme Court has stated that the reduction of the offense to a misdemeanor does not apply retroactively" and presuming the same construction for section 1170.18, subdivision (k)].)

**II. Section 12022.1 Enhancement**

Defendant asserts that if count four, the failure-to-appear charge, is reduced to a misdemeanor, we must also strike the on-bail sentencing enhancement pursuant to section 12022.1. She is correct. However, because we have concluded that count four remains a felony, this enhancement remains as well.

Section 12022.1 creates a sentencing enhancement for persons who commit a felony (the secondary offense) while released on bail or on their own recognizance on a felony charge (the primary offense). (§ 12022.1, subd. (b).) The enhancement cannot be imposed unless the defendant is *convicted* of a felony on both the primary and secondary offenses. (See § 12022.1, subds. (b), (c), (d); *People v. McClanahan* (1992) 3 Cal.4th 860, 869–871 ["on-bail

enhancements are not imposed unless the defendant is ultimately convicted of the 'primary' and 'secondary' offenses"]; *People v. Walker*, *supra*, 29 Cal.4th at p. 586; *People v. Reyes* (2016) 3 Cal.App.5th 1222, 1224.) Here, while the record does not reveal the resolution of the primary offense (in unrelated case number LA078027), defendant does not challenge her sentence on that basis. Instead, she argues that if her conviction on the secondary offense (failure to appear) is reduced from a felony to a misdemeanor, it would invalidate the enhancement. Because we have declined to reduce the secondary offense to a misdemeanor, this argument is moot.

## DISPOSITION

The judgment of the trial court is affirmed.

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COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.